No. 78-929

In the

Supreme Court of the United States

OCTOBER TERM, 1978

VILLAGE OF MAYWOOD, MARK KITCH, EDWARD CARTER AND LEO GRAHAM,

Petitioners,

vs.

GERALDINE STERLING, INDIVIDUALLY AND AS NEXT FRIEND AND MOTHER OF DAMON STERLING, SHAMAI STERLING, KIP STERLING and TIMOTHY JONES, Minors,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RONALD S. COPE
SANFORD M. STEIN
ANCEL, GLINK, DIAMOND & MURPHY, P.C.
180 North LaSalle Street
Suite 2600
Chicago, Illinois 60601
Telephone: 312/782-7606

The Scheffer Press, Inc. (312) 263-6850

TABLE OF CONTENTS

APPENDIX

CITATIONS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS CITED:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

VILLAGE OF MAYWOOD, MARK KITCH, EDWARD CARTER AND LEO GRAHAM,

Petitioners,

vs.

GERALDINE STERLING, INDIVIDUALLY AND AS NEXT FRIEND AND MOTHER OF DAMON STERLING, SHAMAI STERLING, KIP STERLING and TIMOTHY JONES, Minors,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above cause on July 7, 1978. A petition for rehearing was denied on September 12, 1978.

Citations to Opinions Below

The opinion of the Federal District Judge is unreported and is set forth in the appendix hereto, *infra* p. 2a. The opinion of the United States Court of

Appeals for the Seventh Circuit remains unreported at the time of the submission of this petition. It is set forth in the appendix hereto, *infra*, p. 3a-16a.

Jurisdiction

The United States Court of Appeals for the Seventh Circuit rendered its opinion, affirming in part and reversing in part the decision of the district court, on July 7, 1978 in Case No. 77-1632, (Appendix, *infra*, pp. 3a-16a). The Court of Appeals remanded the matter to the district court for further proceedings consistent with the Appellate decision. Petitioners filed a petition for Rehearing in the Court of Appeals on July 21, 1978, which was denied on September 12, 1978. The jurisdiction of this Court to review the judgment of the Court of Appeals for the Seventh Circuit by writ of certiorari is found at 28 U.S.C. 1254(1).

Question Presented

Whether a municipality, which has properly terminated water service to a building, may refuse to restore such service at the request of a tenant of that building until the prior unpaid debt for water service is paid?

Statutes and Constitutional Provisions Involved

The statutory provisions involved are 42 U.S.C. §1983, 42 U.S.C. 1985(3), and Section 32-3 of Village of Maywood, Illinois, Ordinance No. CO-68-13. 42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1985(3) provides:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Section 32.3 of the Village of Maywood Ordinance No. CO-68-13 provides:

> *Sec. 32.3. Bills for service—liability of consumer.*
>
> "It shall be the duty of the Director of Finance to cause a statement of charges for sewer and water service to be delivered at least once every three

months to each consumer, except those obligated to pay monthly and to those a statement shall be delivered each month. The owner of the premises, the occupant thereof and the user of the service shall be jointly and severally liable to pay for the service on such premises and the service is furnished the premises by the Village only upon the condition that the owner of the premises, occupant and user of the service are jointly and severally liable therefor.

All bills for service shall be rendered as of the first day of the month succeeding the period of which the service is billed, and shall be payable not later than the close of business on the 10th day after date of bill. If payment of the full amount of the bill is not made within said period, then a penalty of ten percent (10%) of the bill shall be added thereto.

In the event the charges for service are not paid within thirty (30) days from the date of the bill for such service, the charges shall be deemed to be delinquent, the service shall be disconnected to the premises of the delinquent consumer and the service shall not be resumed until all charges in arrears have been paid, including a charge of $5.00 for the services of the Department of Public Works in reinstating said service. The Village Clerk is hereby authorized and directed to file sworn statements showing such delinquencies in the office of the Recorder of Deeds of Cook County, Illinois (or with the Registrar of Titles of said County, if said premises is registered under the Torrens System), and the filing of such statements in said offices shall be deemed notice for payment of such charges for said service."

The Constitutional provision involved is Section 1 of the Fourteenth Amendment of the United States Constitution which provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action was brought by Geraldine Sterling and her four minor children on August 11, 1976, in the United States District Court for the Northern District of Illinois, Eastern Division. The plaintiffs sought injunctive and declaratory relief and damages pursuant to alleged violations of 42 U.S.C. Section 1983, 42 U.S.C. Section 1985(3) and the Fourteenth Amendment of the United States Constitution.

On August 24, 1976, the plaintiffs filed their amended complaint and on September 17, 1976, the defendants filed their answer. On February 10, 1977, the plaintiffs filed their second amended complaint seeking declaratory relief and damages. In Count I of their Complaint, respondents contended that petitioners terminated the water service of respondents upon the unilateral request of Melvin Ward, their landlord, and without prior notice and an opportunity for hearing. Respondents alleged discrimination because they were refused water service and a denial of due process of law as protected by the United States Constitution. In Count II of their Complaint, respondents alleged that petitioners willfully conspired to deprive the respondents of their rights guaranteed under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution.

Federal District Judge Frank J. McGarr, on April 16, 1977, issued a Memorandum Opinion and Order and dismissed the complaint *sua sponte*. In his Memorandum Opinion and Order, the Court found that

> "that plaintiffs have attempted to establish a federal claim out of what is essentially a landlord and tenant problem." (Appendix p. 2a)

The court further found that the complaint did not properly

> "state a claim upon which relief can be granted under 42 U.S.C. §1983, 42 U.S.C. §1985(3) or the Fourteenth Amendment to the United States Constitution." (Appendix p. 2a)

Respondents appealed to the U.S. Court of Appeals for the Seventh Circuit, which, in a split decision dated July 7, 1978, affirmed in part and reversed in part the decision of the District Court. In its opinion, the majority held that respondents had no contractual or statutory basis for any legitimate claim of entitlement to continued water service and that respondents were not deprived of a Due Process right by petitioners' termination of water service. (Appendix p. 8a) Judge Wood, in a separate opinion, concurred with this portion of the majority opinion. (Appendix p. 16a). The court then found that in refusing to restore water service, both equal protection of the law and due process of law were denied in violation of the Fourteenth Amendment of the U.S. Constitution. (Appendix p. 11a) Judge Wood dissented from this portion of the majority opinion. (Appendix, *infra* p. 16a). Petitioners filed their petition for rehearing in the United States Court of Appeals for the Seventh Circuit on July 1, 1978. The petition for rehearing was denied on September 12, 1978.

Respondents complained that water service to premises they were occupying at 2111 South Thirteenth Avenue, Maywood, Illinois, was discontinued and they were refused water service for a period of four days. (R.Document 10, First Amended Complaint, par. 17; Deposition of Eddie Carter, filed March 16, 1977, pp. 32-33.) Respondents occupied the residence at the above address claiming variously to be either the tenants or intended purchasers of the property (R. Doc. 10, par. 10; Deposition of Leo Graham, filed September 22, 1976; R. Doc. 16, par. 15). The property was owned by Mr. and Mrs. Melvin Ward and Melvin Ward was listed in the records of the Village of Maywood as the owner and occupant of the property (R. Doc. 16, par. 15).

Respondent, Geraldine Sterling, had been seeking to buy the premises in question (Deposition of Geraldine Sterling, filed May 5, 1977, pp. 25-26), however, she never closed the deal for its purchase (Dep. of Sterling, pp. 27-29). She was advised by her real estate agent that the owners of the premises would permit her to occupy the property upon the payment of $125.00 as rent until such time as the sale of the property to her could be completed (Dep. of Sterling p. 30). Sterling was advised by her realtor that she could occupy the premises on July 22, 1976 (Dep. of Sterling p. 44). Sterling had not received any keys to the property but gained access through a broken window in the back door. (Dep. of Sterling p. 45). The owners claimed they had not given Sterling permission to occupy the premises (Dep. of Sterling p. 46). The rental of $125.00 was never received by the Wards and Sterling never received a lease nor had she signed a completed real estate sales contract for the property (Dep. of Sterling pp. 52-54).

Water service had been provided to the property by the Village of Maywood. The bill for water service had gone unpaid for several months prior to the time that Sterling occupied the premises. At the time the complaint was filed, the unpaid amount for water service at the Ward property exceeded $400.00. (R.Doc. 16, par. 15). Several notices had been sent to Ward to pay the bill and one notice indicated that water service would be suspended upon continued refusal to pay the bill. (R.Doc. 16, par. 15) On August 5, 1976, Ward informed the Village of Maywood Water Department that he had moved from the premises and requested a final bill for water service (R.Doc. 16, par. 15). The final bill was prepared in the amount of $439.00 and delivered to the property which was now occupied by Sterling. (R.Doc. 10, par. 16; Plaintiffs Exhibit #1). Ward failed to pay the bill. Ward requested, since he no longer occupied the property, that the water service be discontinued (Dep. of Graham pp. 26, 39). Accordingly, on August 9, 1976, Village of Maywood personnel terminated water service to the Ward property. (R. Doc. 16, par. 15).

Upon termination of water service, Sterling came to the Village of Maywood offices stating that she was leasing the property from Ward and intended to buy the property. Sterling asked that the water service be resumed. (R. Dep. of Graham p. 31; Dep. of Sterling p. 63).

Village of Maywood officials explained to Sterling that the arrearage in the water bill required payment before water service could be resumed to the premises. They also requested that Sterling produce some documentation to support her claim that she was lawfully occupying the premises (Dep. of Graham p. 56). Sterling however, was

unable to produce either a lease or a real estate sales contract, or any other document to indicate that she was not a mere trespasser upon the Ward property. (R. Doc. 16, par. 37; Dep. of Graham pp. 69-71).

Sterling admitted that she had not paid any rent to the owners of the property (Dep. of Sterling p. 74). Sterling did not notify the Village that she had moved into the premises or seek to make any arrangement for water service from the time she began occupying the Ward property on July 22, 1976, until after water service to the premises was terminated (Dep. of Sterling, pp. 62-63). Sterling agreed to make arrangements to pay the unpaid balance for water service (Dep. of Graham, p. 54), but never made those arrangements. Instead, she sought the advice of legal counsel (Dep. of Graham, p. 38). Water service to the premises was restored on August 13, 1976, after the owner's agent paid $100.00 toward the arrears in the water bill and promised to pay the remainder (Dep. of Eddie Carter filed March 16, 1977, pp. 33-32).

Ordinance No. CO-68-13 allows the Village of Maywood to disconnect service of the combined waterworks and sewerage system if the charges for the service are not paid within thirty days of the bill for such service. The Ordinance further directs that the service shall not be resumed until all charges in arrears have been paid. (Maywood, Illinois. Ordinance No. CO-68-13, §32.3)

ARGUMENT

I.

THE COLLECTION METHOD BY WHICH A MUNICIPALITY REFUSES TO RESTORE WATER SERVICE UNTIL THE BILL FOR THAT SERVICE IS PAID DOES NOT DENY EQUAL PROTECTION OF THE LAW TO A TENANT REQUESTING SERVICE.

This case involves a question of great importance to municipalities throughout the country. The practice of not restoring water service to a property until an unpaid prior bill is settled is a common one. It is the most convenient and inexpensive way which a municipality has to recover for unpaid service. The Village's simple collection scheme is universally accepted as the most effective way to collect revenues needed to operate a municipal utility and to pay the obligation to bondholders who provided capital to build combined water and sewerage systems. Nonetheless, the Circuit Court of Appeals for the Seventh Circuit, as well as the Circuit Courts of Appeals for the Fifth and Sixth Circuits have stated that when a collection policy such as that of the Village of Maywood is applied against a renter of property, the policy establishes a system of classification that unjustly discriminates between those who rent property where water bills are paid and those who rent property where water bills are unpaid. This important question of Federal law has not been settled by this Court and the opinion of the Court of Appeals is in conflict with State court opinions throughout the country.

Petitioners contend that, even if such a classification exists, under the decisions of this Court the classification

does not deny equal protection of the law because there is a rational relationship between the classification and the legitimate governmental purpose of collecting unpaid water bills, and there is no hostile or invidious discrimination of the kind that offends the Fourteenth Amendment of the United States Constitution.

In its opinion, the Seventh Circuit initially found that a tenant who receives water service pursuant only to a lease agreement with his landlord can claim no entitlement to water service, and has no property right in continued water service. As such, the tenant so situated would not be entitled to notice or hearing prior to termination of the water service because the landlord had failed to pay the water bill. The Court below rejected the notion of several district courts that a water user has a legitimate entitlement to continued water service when that service is terminated due to arrearages in the landlord's water bill, (Appendix, infra.) See *Davis* v. *Weir*, 328 F. Supp. 317 (N.D. Ga. 1971); *Koger* v. *Guarino*, 412 F.Supp. 1375 (E.D. Pa. 1976) and *Lamb* v. *Hamblin*, 57 F.R.D. 58 (D.Minn. 1972). The Court below concluded that

> "Nothing in any of the decisions cited by plaintiff or in anything plaintiff has argued persuades us that she, as merely a water user, had a legitimate claim of entitlement to continued water service once the landlord requested termination of that service." (Appendix, *infra*, p. 10a).

Petitioner agrees with the above analysis. In the same opinion, however, the Court below found that petitioners were required to *reinstate* water service to the same tenants who were found to have no "legitimate claim of entitlement" to continued water service. To do otherwise, the Court reasoned, would violate those tenants' rights of

equal protection of the law and due process of law. (Appendix, *infra,* p. 11a)

It is difficult to see where the Seventh Circuit has drawn the line between "due process entitlement" to continued water service, which it says a tenant does not have, and an "equal protection right" to have water service reinstated which right the Seventh Circuit says a tenant does have. This confusing conclusion will be no easier to understand by thousands of municipal officials all over the country who must deal daily with the problems of supplying water service. These officials must, according to the decision below, be instructed that they may properly discontinue water service without notice to tenants where property owners have failed to pay for the service but that they are required to reinstate the same service at the first request of a tenant, whether or not the bill for service has been paid. The Constitution does not require such contrary action.

In holding that respondents were denied their rights to equal protection when petitioners refused to reinstate water service, the Court below relied upon the earlier decisions of two Circuit Courts of Appeals: *Davis* v. *Weir,* 497 F.2d 139 (5th Cir. 1974) and *Craft* v. *Memphis Light, Gas & Water Division,* 534 F.2d 684 (6th Cir. 1976) *aff'd on other grounds.* The Courts in those cases found a "two-class system" operating upon utility service applicants, i.e. "applicants whose contemplated service address is encumbered with a pre-existing debt (for which they are not liable) and applicants whose residence lacks the stigma of such charges." (Appendix, *infra* p. 11a). Having decided that such a two-class system exists, the Seventh Circuit stated:

> "Since that classification is not 'suspect' and does not affect any fundamental interests, the issue becomes whether the classification is rationally related to the legitimate governmental purpose of collecting unpaid water bills." (Appendix, *infra* p. 11a).

The Court then quoted from *Craft* and *Weir* in finding that petitioners' collection scheme

> "divorces itself entirely from the reality of legal accountability for the debt involved [and] is devoid of logical relation to the collection of unpaid water bills from the defaulting debtor. 497 F.2d at 144-45, 534 F2d at 690." (Appendix, *infra,* p. 11a).

The Village agrees that the rule of law to be applied in this case is the "rational relationship" test. The Village contends, however, that the Seventh Circuit reached its conclusion without considering that the legitimate purpose of a municipal government to collect water bills, is rationally related to a policy that demands that water service be discontinued, and remain discontinued, until delinquent payments for water service are made.

The Village of Maywood has not sought payment of a water service debt from those who have not incurred such a debt. The Village of Maywood sought payment from the landlord who incurred the debt. It is for that very reason that there is a rational relationship between disconnection of water service and the legitimate interest that Maywood has in collecting its water bills. The collection scheme is not devoid of legal accountability for the water debt, rather it places that responsibility squarely where it belongs, upon the owner of the property. It is the owner who incurred the debt and who stands to benefit most from its non-payment. This is especially true if the water must be restored at the request of a tenant. Presumably the

tenant pays rent from which the landlord earns a profit. When a municipality is compelled to reinstate water service at the request of a tenant, the municipality in effect provides the owner with the means to collect rent and earn profits. Under the decision below, however, the municipality may not be paid for this service and is still compelled to provide free water service.

Public policy demands the prompt payment of public utility charges. These charges are needed to repay bonded indebtedness from which capital was initially derived to provide the service. See *Michelson* v. *City of Grand Island,* 154 Neb. 654, 48 N.W.2d 769 (1951) *Schmidt* v. *Village of Kimberly,* 256 P.2d 515 (S.Ct. of Idaho, 1953); *State* v. *City of Miami,* 27 So. 2d 118 (S.Ct. of Florida, 1946). If service recipients are assured that they will receive service whether or not they pay their bill, there is little incentive to pay. If large numbers of service recipients refuse to pay, under a guarantee of continued service, the municipality will lose revenue and may be required to default on its bonds. The ultimate result is that confidence in public debentures will suffer and future public improvement bonds will be more costly to all of the citizens of a municipality so affected. This adversely affects all of the municipality's citizens. A more rationale approach is that if the water bill is not paid, the service is not received. The burden of paying the bill is not placed on the tenant but remains on the landlord who incurred the debt in the first place. As stated by the Court in *Quick* v. *District of Columbia,* 90 A 2d 235 (D.C. Mun. App. 1952) at p. 236:

> "The fact is that the owners of these premises have not paid or secured to be paid the water rents for many years. As far as they are concerned the District had the right to stop the water supply and refuse to restore it until the arrears were paid. Appellant, whether called principal tenant or operator acting under and for the owners, had no greater rights than the owners. Although he was under no legal duty to pay the arrears, he had no right to demand the water be turned on before the arrears were paid."

Alternative collection options available to municipalities demonstrate further the rationality and reasonableness of denying reinstatement of water service upon a tenant's request. Under the decision of the Court below municipal governments will be forced to institute costly litigation to collect utility fees, or they may compromise their claims, presumably at some significant reduction in the total amount due. Such practices will be costly to all the taxpayers of municipalities and will encourage utility service debtors to delay or refuse to pay their bills in the hope of settling the claim for a smaller amount. *Barry* v. *Commonwealth Edison Co.,* 374 Ill. 473, 29 N.E.2d 1014 (1940).

II.

TERMINATION OF MUNICIPALLY SUPPLIED WATER SERVICE AS A MEANS TO ENFORCE PAYMENT FOR THE SERVICE IS A COMMON PRACTICE THAT HAS RECEIVED WIDESPREAD APPROVAL BY THE COURTS.

There is overwhelming support and widespread approval for municipal ordinances that permit termination of water and other utility services for non-payment of charges. Cases supporting this position include:

Michelson v. *City of Grand Island, et al.,* 154 Neb. 654, 48 N.W. 2d 769 (1951); *Schmidt* v. *Village of Kimberly,* 256 P. 2d 515 (S.Ct. of Idaho, 1953); *Ripperger, et al.*

v. *City of Grand Rapids, et al.,* 338 Mich. 682, 62 N.W. 2d 585 (1954); *Womack* v. *Peoples Water Service Company,* 61 So. 2d 78 (S.Ct. of Miss., 1953); *State* v. *City of Miami,* 27 So. 2d 118 (S.Ct. of Fla., 1946); *Moran* v. *City of Seattle,* 179 Wash. 555, 38 P. 2d 391 (1934); *Patterson* v. *City of Chattanooga,* 241 S.W. 2d 291 (Supreme Court of Tennessee, 1951); *Rash* v. *Louisville and Jefferson County Metropolitan Sewer District, et al,* 309 Ky. 442, 217 S.W. 2d 232 (1949); *McCormacks, Inc.* v. *City of Tacoma,* 170 Wash. 103, 15 P.2d 688 (1932); *Harrison* v. *Jones,* 226 Ga. 344, 175 S.W. 2d 26 (1970); *Lapham* v. *Town of Haines,* 372 P.2d 376 (Supreme Court of Alaska, 1962); *Quick* v. *District of Columbia, et al.,* 90 A.2d 235 (D.C. Mun. App., 1952); *Birmingham Waterworks Company* v. *Edwards,* 16 Ala. App. 674, 81 So. 194 (1918); *City of Atlanta* v. *Burton,* 90 Ga. 486, 16 S.E. 214 (1892); *Siegel* v. *Minneapolis,* 135 N.W. 2d 60 (Sup. Ct. of Minn., 1965); *Scarborough* v. *Adams,* 264 N.C. 631, 142 S.E. 2d 608 (1965); *Philadelphia* v. *Northwood Textile Mills,* 395 Pa. 112, 149 A. 2d 60 (1961).

In *City of Atlanta* v. *Burton,* 90 Ga. 486, 16 S.E. 214, the court held:

> "[W]hen any particular building or premises is in arrears for water charges, the City does not demand of the present occupant, the payment of a debt due by a former occupant, for which the latter is doubtless liable, but simply exercises its right to require that its proper charge against this building or premises shall be paid before again supplying it with water. . . A very little reflection will suffice to show that when water is furnished on credit at all, some such system as the one above set forth is absolutely necessary to save the City from numerous and constant losses which would simply increase the burdens of those who do pay promptly for the water they consume, as well as of all other taxpayers of the City. . . .We therefore think that the provisions of the City Charter on this subject are both fair and just, and no good reason appears why they should not be enforced. . . .The doctrine that a City has a right to shut off water from premises for non-payment of charges, and keep it shut off until the arrears are paid, is sustained by *Girard Life Insurance Company* v. *Philadelphia,* 88 Pa. St. 393 *Com.* v. *City of Philadelphia,* 132 Pa. St. 288 19 Atl. Rep. 136; and *Sheward* v. *Water Company,* 90 Cal. 635, 27 Pac. Rep. 439. . . ." 16 S.E. 215, 216

In *Moran* v. *City of Seattle,* 179 Wash. 555, 38 P.2d 391 (1934), the Supreme Court of Washington upheld a statute which

> ". . . conferred upon the City the positive right to cut off the water or light service, in accordance with rules and regulations considered and found to be reasonable, and adopted to promote the collection of the bills." 39 P. 2d 392.

The same court specifically found that the statute "did not offend the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution." *Id.* at 393.

The difficulty that is likely to be encountered when a municipality attempts to collect utility charges under the decision of the court below was forecast by the Supreme Court of Mississippi in *Central Louisiana Power Company* v. *Thomas,* 145 Miss. 352, 110 So. 673 (1927). There the court held that an electric company had the right to enforce payment of its bills by cutting off the electric current of its delinquent patrons. The court stated:

> "To hold otherwise would have the effect of leaving such a public utility as appellant forced to continue

service to its patrons, pending settlement of counterclaims for unliquidated damages, until such claims were settled by the courts. Such forced service might continue indefinitely, and, because thereof, the efficiency of the service to the public might be materially interferred with." 110 So. 674.

The position of the court in *Central Louisiana Power Company* v. *Thomas, supra,* was echoed in *Womack* v. *Peoples Water Service Company,* 61 So.2d 785 (Supreme Court of Mississippi, 1953).

Furthermore, in *Siegel* v. *Minneapolis Gas Company,* 135 N.W.2d 60 (Supreme Court of Minnesota, 1965), the court upheld the right of a utility company to discontinue service to a customer who defaults in payment. The court stated in upholding this practice that:

> "The reason for such a rule is that many lawsuits to collect small bills against scattered customers could result if the remedy for collecting them was limited to actions at law. *Steele* v. *Clinton Electric Light & Power Company.,* 123 Conn. 180, 193 A 613, 112 ALR. 232, and cases cited. See, also, *Berner* v. *Interstate Power Co.,* 244 Iowa 298, 57 N.W.2d 55, in line with this reasoning." 135 N.W. 2d 62

The refusal to reinstate service until the prior unpaid bill is paid is a method of collection which has received widespread approval and, in the context of water service, makes sense. Furthermore, the test is not whether there might be some other socially desirable method of collecting unpaid bills but whether this method is "rationally related to the legitimate governmental purpose of collecting unpaid water bills." *Sterling* v. *Village of Maywood,* Appendix p. 11a. The Village's method of collection is so related.

III.

THE ONLY TEST TO BE APPLIED IS WHETHER THE COLLECTION SCHEME IS RATIONALLY RELATED TO THE PROPER PUBLIC PURPOSE OF COLLECTING UNPAID WATER BILLS.

The decisions of this Court are legion supporting the proposition that a state created classification does not violate the Equal Protection Clause of the Fourteenth Amendment provided that the classification is rational and reasonably related to a legitimate purpose of the government. Among recent decisions where the rule has been reiterated are *Carrington* v. *Rash,* 380 U.S. 89, 85 S.Ct. 775 (1965), *Rinaldi* v. *Yeager,* 384 U.S. 305, 86 S.Ct. 1497 (1966), *Levy* v. *Louisiana,* 391 U.S. 68, 88 S.Ct. 1509, (1968), and *Trimble* v. *Gordon,* 430 U.S. 762, 97 S.Ct. 1459 (1977).

In *Baxstrom* v. *Herold,* 383 U.S. 197, 86 S.Ct. 760, (1966) this Court stated,

> "Equal Protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. (Citations Omitted). *Id.* at 762.

In *Lindsey* v. *Normet,* 405 U.S. 56, 92 S.Ct. 862, (1972) this Court concluded

> "We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality. . . . The Constitution has not federalized the substantive law of landlord-tenant relations. . . ." *Id.* at 874.

In *Allied Stores* v. *Bowers,* 358 U.S. 522, 77 S.Ct. 437 (1959), this Court found that,

> "The fact that a statute discriminates in favor of certain classes does not make it arbitrary if the discrimination is founded upon a reasonable distinction, or there is any state of facts reasonably conceived to sustain it. *Id.* at 441.

The rationale of denying reinstatement of water service until an unpaid bill is paid is found in the convenience, expediency, economy and calculated success of this collection scheme over all others. While this may incidentally create serious inconvenience for individual tenants, the collection scheme does not violate the equal protection clause of the Fourteenth Amendment. "Rough accommodations made by government in solving its problems do not violate equal protection unless the lines drawn are hostile and invidious." *Norwell* v. *Illinois,* 373 U.S. 420, 83 S.Ct. 1366 (1963). The alternatives to the present system are so costly and uncertain as to work a hardship upon all municipal taxpayers.

As in *Baxstrom* v. *Harold,* 383 U.S. 197, 86 S.Ct. 760 (1966) and *Allied Stores* v. *Bowers,* 358 U.S. 522, 77 S.Ct. 437 (1959), some people may encounter different circumstances than others, but that does not mean they have been denied equal protection of the law. As in *Lindsey* v. *Normet,* 405 U.S. 56, 92 S.Ct. 862 (1972) some individuals may encounter landlord-tenant problems, while others may not, but their difficulties do not rise to the level of a constitutional question. As in the present case, there may be competing social philosophies as to the most desirable method of collecting unpaid water bills, but that does not mean that the Village's system denies equal protection of the law.

CONCLUSION

Wherefore, Petitioners pray that this Petition for a Writ of Certiorari be granted and the judgment below reversed in part.

Respectfully submitted,

Ronald S. Cope
Sanford M. Stein
Ancel, Glink, Diamond & Murphy, P.C.
180 North LaSalle Street
Suite 2600
Chicago, Illinois 60601
Telephone: 312/782-7606

APPENDIX

IN THE

UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

No. 76 C 2991

GERALDINE STERLING, et al.,

Plaintiffs,

v.

VILLAGE OF MAYWOOD, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

The court has reviewed plaintiffs' complaint and finds that the plaintiffs have attempted to establish a federal claim out of what is essentially a landlord and tenant problem. The court finds that the allegations set forth in the complaint do not properly state a claim upon which relief can be granted under 42 U.S.C. §1983, §1985(3) or the Fourteenth Amendment to the United States Constitution. The court, therefore, sua sponte, dismisses plaintiffs' complaint for failure to state a claim upon which relief can be granted.

ENTER:

/s/ Frank J. McGarr

Frank J. McGarr
United States District Judge

Dated: April 15, 1977

IN THE

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 77-1632

GERALDINE STERLING, et al.,

Plaintiffs-Appellants,

v.

VILLAGE OF MAYWOOD, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 2991—FRANK J. MCGARR, *Judge.*

Argued January 16, 1978—Decided July 7, 1978

Before SPRECHER and WOOD, *Circuit Judges,* and REYNOLDS, *Chief District Judge.**

SPRECHER, *Circuit Judge.* This appeal raises the issue of what liability, if any, a municipality or its employees incur under 42 U.S.C. § 1983 or the Fourteenth Amendment when employees of the municipality's water department terminate a tenant's water service at the request of the landlord and subsequently decline to reinstate service after the tenant promises to pay for future service and offers a deposit to guarantee such payment.

---

* Chief Ditsrict Judge John W. Reynolds, of the Eastern District of Wisconsin, sitting by designation.

I

Plaintiff is a mother of four minor children,[1] and resides in the Village of Maywood, Illinois (Village). Defendants are the Village, itself; Mark Kitch, its Manager; Edward Carter, an administrative assistant in charge of water service; and Leo Graham, an employee of the Village's Water Department.

Plaintiff's complaint[2] alleged in Count I[3] that she entered into an oral lease with Mr. and Mrs. Melvin Ward to rent a single family dwelling located within the Village. Pursuant to her understanding of that lease, she moved into the building with her children on July 22, 1976. The landlords, on the next day, attempted to evict her, but were unsuccessful.

On August 5, 1976, the landlords called the Village's Water Department and requested that water service be

---

[1] Mrs. Sterling's four minor children are also included as plaintiffs in this suit. However, since all of the plaintiffs' actions in response to the Village's termination were performed by Mrs. Sterling, we will henceforth use the expression "plaintiff" as a reference to her alone.

[2] Since the district court dismissed plaintiff's complaint for failure to state a cause of action, we must accept as true its factual allegations. *Walker Press Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* 382 U.S. 172, 174-75 (1965); *Hampton* v. *City of Chicago,* 484 F.2d 602, 606 (7th Cir. 1973), *cert. denied,* 415 U.S. 917 (1974); *Ricci* v. *Chicago Merchantile Exchange,* 447 F.2d 713, 715 (7th Cir. 1971), *aff'd,* 409 U.S. 289 (1973). In addition, our factual inquiry is limited to those facts alleged in the complaint, and therefore, we cannot consider the various depositions included by both parties in the record on appeal. *Kirke* v. *Texas Co.,* 186 F.2d 643, 647 (7th Cir. 1951).

[3] Count II of plaintiff's complaint was a claim under 42 U.S.C. § 1985(3) alleging a conspiracy between her landlords and the Village to deprive her of her rights. That claim also was dismissed by the district court. Plaintiff raises no issue as to her § 1985 claim. We, therefore, assume that she is not contesting the district court's judgment on that point.

terminated at the building where plaintiff was residing. The next day, August 6, a meter reader from the Village went to plaintiff's residence and suggested that she should go to the Village Hall and place the water service in her name. The following day plaintiff received a water bill at her residence addressed to "occupant" stating that $439.06 was due on August 25, 1976, for past water service. The bill also contained a note suggesting that the occupant place her name on the Village's records to avoid termination of service.

On August 9, the Water Department, without notice to plaintiff, terminated her water service. Plaintiff went to the Village Hall to find out why her service had been discontinued. In response to plaintiff's inquiry, defendants Carter and Graham explained that it was Village policy to terminate service upon the request of the person in whose name the bill is being paid. Plaintiff sought at that time to have her water service reinstated and to that effect promised to pay for future water service and offered a deposit to guarantee payment. Defendants denied plaintiff's request for reinstatement for three reasons: because the landlords had not paid their bill, because plaintiff lacked a written lease and because the landlords had requested the termination. Plaintiff's water service was not reinstated for four days, and then it was provided only because the landlords agreed to pay $100 of the $439.06 they owed the Village Water Department.

Based on these facts, plaintiff sought a declaratory judgment and damages against the private defendants and the Village based on 42 U.S.C. § 1983[4] and the due process

[4] That section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

clause of the Fourteenth Amendment.[5] The district court reasoned that "[p]laintiffs have attempted to establish a federal claim out of what is essentially a landlord and tenant problem" and held, *sua sponte,* that the allegations "do not properly state a claim upon which relief can be granted under 42 U.S.C. § 1983, § 1985(3) or the Fourteenth Amendment . . . ." Plaintiff appeals from the district court's judgment.

II

Plaintiff's first argument is that the defendants violated her due process rights when they terminated her water service without prior notice and an opportunity for some type of a "hearing".[6] Plaintiff reasons that, although a municipality is under no obligation to provide water service, once it chooses to do so "a *user* has a legitimate claim of entitlement to continue service absent sufficient cause for termination . . . ." *Koger* v. *Guarino,* 412 F. Supp. 1375, 1386 (E.D. Pa. 1976), *aff'd without opinion,* 549 F.2d 795 (3d Cir. 1977) (emphasis added).[7]

[5] The district court's jurisdiction over the individual defendants was based on 28 U.S.C. § 1343(3) and jurisdiction over the Village was based on 28 U.S.C. § 1331.

[6] To state a claim under 42 U.S.C. § 1983, plaintiff must demonstrate both that there has been state action and that that action has deprived plaintiff of a constitutional right. *Adickes* v. *Kress & Co.,* 398 U.S. 144, 169 (1970). There is no dispute here that the action of the Village's Water Department constituted state action. The only issue is whether plaintiff has been deprived of any constitutional rights.

[7] Plaintiff cites several cases for the proposition that utility users possess a constitutionally protected property interest in continued service. However, almost all of those cases deal with the right of the utility "customer"—the person paying the utility bill directly to the utility—as opposed to the rights of the utility user. *See Craft* v. *Memphis Light, Gas & Water Div.,* 534 F.2d 684, 687 (6th Cir. 1976), *aff'd,* 46 U.S.L.W. 4398 (May 2, 1978);

In evaluating the merits of plaintiff's contention, our concern must be with whether some basis exists for concluding that plaintiff's role as a tenant-water user creates a constitutionally protected property interest in continued water service. To resolve that issue, we must rely on the Supreme Court's analysis of "property" in *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), where the Court reasoned:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

In applying that standard the Court instructed that property interests are not created by the Constitution, but rather they are "created" and "defined by existing rules or understandings that stem from an independent source such as state law." *Id. See also Arnett* v. *Kennedy*, 416 U.S. 134, 151-52 (1974) (plurality opinion); *Goss* v. *Lopez*, 419 U.S. 565, 574-75 (1975). The Court suggested two sources that create property interests: state statutes[8] and contracts—express or implied—between individuals and some agency of the state.[9] 408 U.S. at 577-78.

In our view, plaintiff has no contractual or statutory basis for any legitimate claim of entitlement to continued water service. First, plaintiff had no contractual relationship with the Village Water Department. The landlords of her building were the applicants for water service and they were the persons who sought termination of that service. Thus, the express contractual interest in water service was theirs exclusively. In addition, plaintiff makes no claim that a de facto understanding existed between her and the Village. Thus, there is no implied property right. *Perry* v. *Sindermann*, 408 U.S. 593 (1972).

Second, plaintiff can point to no provision in the state's laws or in the municipal ordinances that purports to provide her with a legitimate claim of entitlement to water service. In fact, the Village's municipal ordinance precludes such a claim. In its preamble, the ordinance does

---

[7] (Continued)
Palmer v. *Columbia Gas of Ohio, Inc.*, 479 F.2d 153, 156 (6th Cir. 1973); *Condosta* v. *Vermont Elec. Corp., Inc.*, 400 F. Supp. 358, 365 (D. Vt. 1975); *Donnelly* v. *City of Eureka*, 399 F. Supp. 64, 67 (D. Ka. 1975); *Limuel* v. *Southern Union Gas Co.*, 378 F. Supp. 964, 965 (W.D. Tex. 1974); *Bronson* v. *Consol. Edison Co. of N.Y.*, 350 F. Supp. 443, 447 (S.D.N.Y. 1972); *Hattell* v. *Public Service Co. of Colorado*, 350 F. Supp. 240 (D. Colo. 1972); *Stanford* v. *Gas Service Co.*, 346 F. Supp. 717, 719 (D. Ka. 1972), *But see Davis* v. *Weir*, 328 F. Supp. 317 (N.D. Ga. 1971), *aff'd*, 497 F.2d 139 (5th Cir. 1974); *Koger* v. *Guarino*, 412 F. Supp. 1375, 1386 (E.D. Pa. 1976), *aff'd*, 549 F.2d 795 (3d Cir. 1977); *Lamb* v. *Hamblin*, 57 F.R.D. 58 (D. Minn. 1972). Our decision that plaintiff, as a tenant water user, does not have a due process right to water service in this case in no way conflicts with the analysis in those cases.

During the pendency of this appeal, the Supreme Court decided *Memphis Light, Gas & Water Division* v. *Craft*, 46 U.S.L.W. 4398 (May 2, 1978). In that case, the Court held that a customer of a municipal water company has a protectible property interest in continued service, and thus some procedures for resolving billing disputes must be provided by the utility. The *Craft* opinion, however, does nothing to aid plaintiff's claim in this case because she is not a customer of the Village of Maywood's Water Department. As is made clear in the text of this opinion, since plaintiff has no contractual relation with the Village, and no statute provides her with an entitlement, she has no basis upon which to claim that there has been a deprivation of any property within the meaning of the Fourteenth Amendment.

[8] *See Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970) (State Welfare Code).

[9] *See Perry* v. *Sindermann*, 408 U.S. 593, 600 (1972) (express contract or de facto tenure policy sufficient to create property interest).

not purport to provide service to all people; instead, it recognizes that "it is necessary that the Village charge the inhabitants thereof for the use thereof and the services supplied." Ord. No. 68 § 32. To effectuate this limited provision of service, the ordinance specifies that "[a]ny householder, property owner or other person desiring water or sewer service . . . shall make application therefor . . . ." *Id.* at § 32.1. Thus, the applicable state law only provides a claim of entitlement to those who have made an application for water service. Since plaintiff has neither a contractual nor a statutory basis to support her claim, we conclude that plaintiff was not deprived of a due process right by defendants' termination of her water service.[10]

Plaintiff correctly points out that other courts have held in other contexts that a water user has a constitutionally protected interest in continued service. However, no court of appeals has discussed this entitlement issue. In *Davis* v. *Weir*, 497 F.2d 139 (5th Cir. 1974), the municipality conceded on appeal that it had a duty to provide the actual user with notice prior to termination.[11] Thus,

[10] We are not unmindful of the inconvenience that our decision will cause individuals such as plaintiff who in the future will have their water service disrupted without notice. However, in light of our discussion in part III of this opinion, it is reasonable to assume that that disruption will be for only a short period of time. In addition, we should note that our decision has the incidental effect of saving municipal utilities the potentially onerous burden of investigating and providing some form of notice and opportunity for a hearing in regard to every request for termination of service.

[11] The reason why the municipality conceded this point is not made clear by the court's opinion. However, the city ordinance at issue there expressly provided for "three days' notice to the owner or tenant before cutting off the water supply for nonpayment of bills." 497 F.2d 139, 141 n.2. Thus, the municipality may have failed to comply with its own ordinance.

the Fifth Circuit did not have to consider whether a property interest existed. 497 F.2d at 143. In *Koger* v. *Guarino, supra,* the Third Circuit affirmed the district court's determination that there was an entitlement, but did so without an opinion.

Three district courts have held that a water user has a legitimate entitlement to continued water service when that service is terminated due to arrearages in the landlord's bill. *See Davis* v. *Weir,* 328 F. Supp. 317 (N.D. Ga. 1971); *Koger* v. *Guarino,* 412 F. Supp. 1375 (E.D. Pa. 1976) and *Lamb* v. *Hamblin,* 57 F.R.D. 58 (D. Minn. 1972). With all due respect to those courts, we find their reasoning unpersuasive as applied in this case. In *Koger,* the court merely stated that an interest existed without explaining the basis for entitlement. 412 F. Supp. at 1386. In both of the other decisions, the courts attached dispositive significance to the importance of water as "an absolute necessity of life." 328 F. Supp. at 321; 57 F.R.D. at 61. That analysis, however, is irrelevant to the question of whether there is an entitlement. As the Supreme Court has made clear, it is the nature, and not the weight or importance, of the plaintiff's interest that determines whether a property interest exists.[12] *Board of Regents* v. *Roth,* 408 U.S. 564, 570-71 (1972); *Goss* v. *Lopez,* 419 U.S. 565, 575-76 (1975). Nothing in any of the decisions cited by plaintiff or in anything plaintiff has argued persuades us that she, as merely a water user, had a legitimate claim of entitlement to continued water

[12] We should make clear that although we have found the analysis on entitlement presented in the three district court opinions to be unpersuasive, we in no way mean to suggest that those cases were wrongly decided on the merits. The issue of what rights a tenant has when the municipality terminates water because the landlord has failed to pay the water bill is not before us. Plaintiff does not allege that the Village *terminated* her water service because of the landlord's failure to pay for past water service.

service once the landlord requested termination of that service.

III

Plaintiff's second argument is that the defendants violated her constitutional rights when they refused to reinstate her water service. Three reasons are listed in plaintiff's complaint for the defendants' refusal to reinstate her water service: (1) the landlord failed to pay his water bill for service at her residence; (2) the landlord requested the termination; and (3) the plaintiff failed to produce a written lease. We believe that plaintiff's allegations are sufficient to state a violation of both her equal protection and her due process rights, and we, therefore, reverse the judgment of the district court on this issue.

With regard to the equal protection argument, two circuit courts have held that a refusal to reinstate water service because the landlord has failed to pay the water bill is a violation of the tenant's right to equal protection. *Davis* v. *Weir*, 497 F.2d 139 (5th Cir. 1974); *Craft* v. *Memphis Light, Gas & Water Division*, 534 F.2d 684 (6th Cir. 1976), *aff'd*, 46 U.S.L.W. 4398 (May 2, 1978). The basis for those holdings is that the municipality is classifying applicants for service into two categories: "applicants whose contemplated service address is encumbered with a pre-existing debt (for which they are not liable) and applicants whose residence lacks the stigma of such charges." 497 F.2d at 144; 534 F.2d at 690. Since that classification is not "suspect" and does not affect any fundamental interests, the issue becomes whether the classification is rationally related to the legitimate governmental purpose of collecting unpaid water bills. We agree with the courts in Craft and *Weir* that a collection scheme

> that divorces itself entirely from the reality of legal accountability for the debt involved, is devoid of logical relation to the collection of unpaid water bills from the defaulting debtor.

497 F.2d at 144-45; 534 F.2d at 690. Since plaintiff has alleged that the unpaid water bill was one reason why the defendants refused to reinstate her service,[13] we must reverse the district court's dismissal of her complaint and remand the case to give plaintiff an opportunity to prove her allegation.

With regard to the due process claim, plaintiff alleged that the defendants required her to produce a written lease before they would reinstate her service. As we stated earlier in this opinion, plaintiff's entitlement to water service is statutorily defined. The Village ordinance dealing with provision of water service states clearly that "[*a*]*ny* . . . *person* desiring water service from the Department of Public Works . . . shall make application" and if the applicant "has complied with all the provisions of the ordinances of the Village, and has paid all fees a permit *shall t*hen be issued. . . ." Ord. No. 68-13, § 32.1 (emphasis added).

According to section 32.1, plaintiff was entitled to water service if she paid her fees and complied with the ordinance's other requirements. Plaintiff alleged that she offered to pay a deposit fee and promised to pay for all future service, which would seem to satisfy the fee requirements. Based on our reading of the Village Ordinance, the only other requirement is that plaintiff provide a completed application for service. Although we cannot determine on the pleadings whether a complete application for water service at plaintiff's residence was on file at the Village Water Department, it is likely that the application for the previous service would have satisfied the Village's requirement. Thus, based on the

[13] Since defendants reinstated plaintiff's water service after the landlord promised to pay a portion of the unpaid water bill, it is reasonable to assume that the bill was a factor of special significance in the defendants' decision not to reinstate service.

Village's ordinance, we can see no reason why plaintiff was denied water service.

The only explanation offered by defendants for their refusal to supply water was that plaintiff lacked a written lease. Initially, we should note that nothing in the statute requires that a written lease be provided in order to receive water service. However, even if the Village has some regulation regarding leases—which defendants have not shown—given the statute's command that "any person" can receive service, the Village at a minimum should have provided plaintiff with an opportunity to prove she had a leasehold interest in her residence. Therefore, based on the Village's ordinance and the pleadings, we conclude that defendants very well may have deprived plaintiff of a constitutionally protected entitlement to water service when they rejected summarily her efforts to reinstate her water service. She must be given an opportunity to prove her allegations.

We reverse the district court's dismissal of plaintiff's complaint on the issue of reinstatement and remand the case for further proceedings consistent with this opinion.

IV

Since we have determined that the district court erred in dismissing completely the plaintiff's complaint, we must consider whether the plaintiff can continue her action for damages against the defendant Village.[14] The issue as originally argued by plaintiff in her briefs was whether the Fourteenth Amendment provided an implied remedy for the constitutional torts she had alleged. *See generally* Hundt, *Suing Municipalities Directly under the Fourteenth Amendment,* 70 Nw. U.L. Rev. 770 (1975);

[14] Given our disposition in part III of this opinion, that a constitutional violation has been alleged, we assume that plaintiff's sole remaining concern is with whether the municipality can be made liable for damages under the Fourteenth Amendment. (*See* appellant's brief at 13-14).

Note, *Damage Remedies Against Municipalities for Constitutional Violations,* 89 Harv. L. Rev. 922 (1976). Plaintiff relied upon the Fourteenth Amendment because she recognized that the Supreme Court's decision in *Monroe* v. *Pape,* 365 U.S. 167 (1961), precluded her from suing the Village under 42 U.S.C. § 1983. During the pendency of this appeal, however, the Supreme Court overruled its prior holding in *Monroe,* and held that municipalities are no longer immune from suits under that statutory provision. *Monell* v. *Dep't of Social Services,* 46 U.S.L.W. 4569 (June 6, 1978).[15] We therefore must now consider the availability to plaintiff of monetary relief against the Village under section 1983.

According to plaintiff's complaint, ordinary employees of the Village Water Department were responsible for the decision not to reinstate her service. Plaintiff does not allege that the decision refusing to reinstate her service was made in accordance with any official policy of the Village or the Water Department. In addition, there is no obligation that there was any "custom" or "practice" within the Department with regard to when or under what conditions terminated service should be reinstated. Absent such allegations, it is clear that under the Court's decision in *Monell- supra,* plaintiff cannot recover under section 1983.

The Court explicitly defined the limits of its decision as follows:

> [T]he language of §1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be

[15] The Court in *Monell* did not discuss explicitly whether the decision should be applied retroactively. The Court did state, however, that "municipalities can assert no reliance claim" to absolute immunity. 46 U.S.L.W. at 4580. That comment would seem to suggest that there would be no prejudice created by applying the ruling to suits pending at the time of the decision. We therefore have decided to apply *Monell* to this case.

liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.

Monell, supra at 4578. Thus, the Court expressly rejected the idea that a municipality could be liable under section 1983 solely on a theory of *respondeat superior*. While that language was dicta since the suit involved there challenged a municipality's official policy, see *id.* at 4584 (Stevens, J., concurring), we nonetheless are obliged to follow it until the Court should decide to the contrary. Since under plaintiff's allegations she could recover only under a theory of *respondeat superior*, we hold that she has failed to state a cause of action for damages against the Village under 42 U.S.C. § 1983.[16]

For the reasons stated above, we affirm the district court's dismissal of the defendant Village and its dismissal of that portion of Count I of plaintiff's complaint dealing with the termination of her water service, but we reverse the district court's dismissal of that portion of Count I dealing with the individual defendants' refusal to reinstate plaintiff's water service and remand to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART.

WOOD, *Circuit Judge*, concurring in part and dissenting in part.

This case arises from the fact that plaintiff was without water service for four days in a residence she was occupying under doubtful circumstances. It is seen from her

[16] Our conclusion that plaintiff cannot recover damages against the Village applies with equal force if we view the claim as being based on the Fourteenth Amendment. This court previously has rejected the theory of *respondeat superior* in suits for damages against municipalities based on the Fourteenth Amendment. *McDonald* v. *State of Illinois*, 557 F.2d 596, 605 (7th Cir. 1977). Thus, plaintiff's suit against the municipality is essentially unaffected by the Supreme Court's decision in *Monell*.

complaint that she claimed to have a temporary oral lease, but this was disputed by the unwilling "landlord" who endeavored, with the assistance of two policemen, to eject her as soon as she occupied his premises. Plaintiff, however, held steadfast for several weeks. The landlord then notified the water department to terminate the existing water service to his premises. Since he was in arrears on his water bill, not surprisingly the water department complied with his request within a few days. The planitiff in the meantime was the beneficiary of the water service for about three weeks without having made her own arrangement or having assumed any obligation to pay for it. Plaintiff was advised by a meter reader, making his final reading on a Friday prior to terminating the water at the owner's request, to contact the water department to make her own arrangements. The next day, Saturday, a written notice to come to the water department was received at the premises. Plaintiff did nothing until after the water service was terminated on the following Monday. Then, however, she quickly responded, demanded immediate restoration of her service, and when the water department failed to comply within one day, filed this suit. The water department found itself faced with a property owner, himself in arrears, demanding the water be turned off, and plaintiff, a stranger to the water department and in a dispute with the owner, demanding it be turned on. It does not seem constitutionally impermissible for the water department, considering that plaintiff was not its only customer, to take a short time to try to solve the problem before resuming service to the premises. The plaintiff, in view of her own tardy contact with the water department, could not reasonably expect instant water service under those circumstances. Had plaintiff undertaken to resolve her own landlord-tenant problem before the shutoff of service, the water department would not now find itself underservedly caught in the middle. In my judgment it appears from the complaint that the plaintiff was responsible for her own brief problem and does not deserve under any theory to benefit financially at

the expense of the village and its officials.[1] After plaintiff got herself in this fix, what she needed was a little patience, not a federal lawsuit.

The facts of this particular case do not rise to the level of a constitutional question. I respectfully dissent from Part III of the majority opinion and would affirm the dismissal of the complaint.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

---

[1] It is not a fact to be considered at this stage of the proceedings, but it appears in the record (not in the complaint) that plaintiff's time without water would have been even shorter had the water department been able to locate her to advise her that the water was being turned on so that there would be no accidental flooding.